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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. ...71-520

CHARLES L. McKENDRICK, as Warden of Walkill State Prison, Ulster County, New York,

Petitioner,

aaginst

MILTON RIVERA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Preliminary Statement

Petitioner, the Superintendent of the New York State Correctional Facility in which respondent is presently incarcerated, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of *United States of America ex rel. Milton Rivera* v. *McKendrick* (judgment entered August 9, 1971). On September 14, 1971, the Court of Appeals granted petitioner's motion to stay issuance of its mandate pursuant to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

Opinions Below

The opinions of neither the District Court nor the Court of Appeals has yet been reported. The District Court's opinion is reproduced as Appendix "A" to this petition. The opinion of the Court of Appeals is annexed as Appendix "B" to this petition.

The opinion of the New York Supreme Court, Appellate Division, Second Department, affirming respondent's judgment of conviction is reported at 28 A.D. 2d 687, 280 N.Y.S. 2d 749, and is reproduced as Appendix "C" to this petition.

The opinion of the New York Court of Appeals affirming the Appellate Division decision is reported at 22 N.Y. 2d 453, 293 N.Y.S. 2d 271, and is reproduced as Appendix "D" to this petition.

Jurisdiction

The judgment of the United States Court of Appeals in this case was entered on August 9, 1971. The order granting petitioner's motion to stay the mandate of the Court of Appeals was entered on September 14, 1971.

The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Questions Presented if Certiorari Be Granted

1. Whether the holding of the Court of Appeals for the Second Circuit conflicts with decisions of other Circuit Courts of Appeals which hold that where witnesses had an initial opportunity to view the perpetrators of the crime at close range in a fully-lit room the identifications are not tainted by subsequent pre-trial confrontations so that their testimony violates due process of law?

2. Whether the decision of the Court of Appeals conflicts with decisions of this Court with respect to what constitutes tainted identification testimony where the identification was not conducted in a prejudicial or suggestive manner?

Statement of the Case

The instant case raises substantial questions as to the standards to be employed in determining whether a pretrial identification of the respondent was so impermissibly suggestive so as to invalidate a later in-court identification.

The respondent Rivera was convicted, after a jury trial, of the crimes of Robbery in the First Degree, Assault in the First and Second Degree, and Possession of a Dangerous Weapon as a felony. On November 30, 1965, he was sentenced by the Supreme Court, Kings County (KERN, J.) to serve an indeterminate term of 10 to 15 years on the robbery conviction, 5 to 10 years on the first degree assault, 2½ to 5 years on the second degree assault and 3½ to 7 years on the possession conviction, the sentences to run concurrently.

The judgment was affirmed by the Appellate Division, Second Department (*People* v. *Rivera,* 28 A.D. 2d 687, 280 N.Y.S. 2d 749 [1967], and thereafter by the New York Court of Appeals (*People* v. *Rivera,* 22 N.Y. 2d 453, 293 N.Y.S. 2d 271 [1968]). Certiorari was denied by this Court (*Rivera* v. *New York,* 395 U.S. 964 [1969]).

In the instant habeas corpus application, Rivera claimed, as he did, unsuccessfully, on direct appeal, that his in-court identification by the two robbery victims was so tainted by the circumstances in which they identified him after his arrest as to unconstitutionally deprive him of due process and the equal protection of law. He asserted that the victims' identification was based on the police's suggestive

presentation to them of his photograph. He also relied on the fact that he was the only person shown to each victim; that both victims identified him at a local hospital, although only one of them was a patient; and that the police took him to be identified contrary to his attorney's instructions that he be taken to jail without being questioned and arraigned the following morning. At the same time, he alleged that the circumstances in which the crime was committed did not afford the victims adequate opportunity to observe the perpetrators.

The relevant facts pertaining to the identification were all elicited at the trial of respondent and his co-defendant, one Torres (there was no separate hearing with respect to identification): Jose Vega testified (through a Spanish interpreter) that on March 5, 1965, he was employed in a grocery store in Brooklyn, New York (16).* The store was well-lighted by "two big fluorescent lights" on the ceiling above the counter upon which rested a cash register (19). Each fluorescent light consisted of three tubes, making a total of six tubes (189). At about 10:00 p.m., a Mr. Vargas entered the store and bought a soda. Respondent and his co-defendant Torres entered the store together "and stood right in front of the counter". Vega described Torres as "the dark one . . . with the close haircut" and Rivera as "the white one" (17-19). Torres had "his hands in his jacket pocket" and said "that I should be quiet; this is a holdup". Vega, who was behind the counter, pointed to the cash register and replied, "Take whatever you want, but leave me alone" (20).

While Torres pointed a gun at Vega, respondent went behind the counter to the cash register. He pulled a lever on the register to open the drawer and scooped up the money that was in it (31; 146-147). Rivera then grabbed Vega by the lapel and the bottom of his jacket, turned him

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* Numbers in parentheses refer to pages of trial transcript, a copy of which was submitted below as an exhibit.

around (181) and took what was in his pockets (20), although Vega tried to stop him from taking his wallet. Respondent then shouted to Torres, "Shoot him, he's getting tough" (20-21).

At this point, Vargas rose from where he was sitting and said to Vega, "Don't be afraid; he's not going to shoot you". Vargas' confidence was misplaced, because as he rose from his seat, Torres, who was three feet away, shot Vargas in the stomach. Despite his wounds, Vargas grappled with Torres. As they fell to the floor, another shot was fired which struck Vargas in the neck (22-23). Two more shots were fired which struck the ceiling (74, 75). Vega jumped to the assistance of his customer (26), grabbed Torres' hand, and wrestled the gun away from him (27, 71). In the midst of this melee, respondent dashed out of the store (61). When Torres attempted to follow, Vega and Vargas struggled to restrain him (33).

Vega testified that Rivera was in his store "about three minutes" and during those three minutes, "he was right in front of me . . . when he looked through my pockets" (47). After the crime, Vega gave the police a description of the clothing worn by both defendants (165). He described respondent as wearing "a white shirt and dark pants" (75).

On cross-examination, it was brought out that the next time that Vega saw Rivera was in a waiting room at the Hospital on March 17. Rivera was there with his father (92-93). As soon as Vega saw Rivera, he identified him to Detective Arthur T. Maxwell (93, 97, 99). When defense counsel pressed Vega to admit that respondent then denied his guilt, Vega replied that Rivera did not say anything. Neither did his father. Rivera merely stood there "like this, with his head down" (102).

New York Law (e.g., *People* v. *Cioffi*, 1 N.Y. 2d 70, 150 N.Y.S. 2d 192 [1956]), prohibits the admission of testi-

mony regarding a prior identification of a defendant's photograph. However, on re-direct, Vega testified that four or five days after the crime he was shown a group of photographs of different men (168, 170). On further cross-examination by respondent's counsel, Vega testified that among these pictures was a photograph of Rivera (174).

Moreover, with respect to Vega's having been shown a group of photographs by the police, several things must be clarified. First, this testimony was initially elicited on cross-examination, not on direct. Secondly, Vega's full testimony in this respect was not merely that the detective showed him a photograph (80), but that when Vega was in the store, the detective came in "with a *bunch* of photographs" and the officer showed them to him and he apparently picked one out (80, 92; emphasis added). At this juncture, a bench conference was held off the record, as a result of which the questioning shifted to another aspect entirely apart from photographs (80-81). Third, Vega also testified that Detective Maxwell "showed me a photograph and I said to him, *'Is this the man?'* " (89; emphasis supplied). However, immediately after this answer was given, the Court ordered it stricken from the record (89), denied a motion for a mistrial on behalf of the co-defendant Torres, and pointed out that "the answer of the witness simply refers to a photograph. That's all; period" (89-90). Finally, while it is true, as indicated above, that although Vega was shown four or five photographs of five different men and showed the detective one (68-72), because of the New York evidentiary rule Vega did not state that he had picked out Rivera's photograph and none of the photographs were marked or offered in evidence.

Angelo Vargas testified through a Spanish interpreter that he came into Mr. Vega's store between 9:30 and 10:00 o'clock in the evening for a Pepsi-Cola. Just as he finished drinking the soda, two men entered the store. The one in

front had a gun in his right hand and said, "Don't move; this is a holdup" (176-178). The man with the gun was "small and dark" and Vargas recognized him in court as the co-defendant Torres (178, 179). He also pointed out Rivera as the man who came in with Torres (179). Respondent was wearing "a white shirt and dark pants" (187). As soon as Torres announced it was a holdup, Mr. Vega put his hands up over his head (180-181). Rivera came behind the counter (198); he was no more than five feet away (197). His account of what then occurred was substantially the same as Vega's (181).

Shortly thereafter, Vargas was taken in a patrol car to Greenpoint Hospital (182-183). Vargas was confined to the hospital from March 5 to March 29 (182, 183). After March 29, he returned to the hospital for out-patient treatment twice every month until September 7 (184). At the hospital, his stomach was operated on, leaving a scar of more than nine inches.

On cross-examination, Vargas indicated that while he was in the hospital, Detective Maxwell "took some pictures to me" and asked whether he "would know a person from this group" (196). He was not asked his response to this query for the reasons indicated above. On further cross, he testified that he next saw Rivera when the detective brought him to the hospital on March 17 (12 days after the shooting). At that time, he had no conversation with the detective with respect to respondent (196).

Detective Arthur T. Maxwell testified that he conducted an investigation at the scene of the crime. He identified a jacket, hat and gun that were on the counter of the grocery store (256-257). "Lying on top of the coat was a small leather wallet or card case which I opened and examined". Inside the wallet he found "a New York City chauffer's registration, registered to Francisco Torres, 964 Simpson Avenue, the Bronx, with a picture therein" (257).

The detective obtained a description of the defendants on the night of the holdup after talking to Vargas and Vega (269). He arrested Torres several hours after the crime, at 1:30 a.m., at 964 Simpson Avenue, Apartment 4D, in the Bronx (267).

After the holdup, the detective sent out two alarms. The second alarm contained a description of Rivera in which "he was named by name, address and our identification number in the Police Department" (313). On March 8, 1965, he went to Rivera's residence at 366 East 179th Street in the Bronx. There he spoke to respondent's father and a young woman, and left word that he wanted to see him (269).

On cross-examination by respondent's counsel, Detective Maxwell testified that he arrested Rivera at the office of Mr. Weidberg, his lawyer, on March 17, 1965. He acknowledged that Mr. Weidberg had instructed him not to question respondent and to take him to the police station (274), and stated that, in fact, he had not questioned him (291, 320). However, after bringing him to the station house, the witness took him to Greenpoint Hospital (275). About 20 to 25 minutes prior thereto, the detective had called Vega and told him that he would have someone for him to identify; he did not further discuss the case with him before presenting Rivera to him in the hospital's waiting room (275). He asked Vega if this was the man (but no testimony was, of course, given as to his answer) and then took Rivera to Vargas' room in the hospital and repeated the procedure (278). He had also spoken to Vargas before bringing Rivera in (279).

On re-direct examination, Maxwell testified that in the course of his investigation, he showed photographs of 5 or 6 different people to Vega and also to Vargas at the hospital (316-318). Included in the group was a photograph of respondent (316). However, on objection, he

was not allowed to state whether they had identified Rivera (317-318). (See *People* v. *Cioffi, supra*).

Respondent did not testify in his own behalf, but offered the testimony of one Mrs. Nellie Buso who stated, *inter alia,* that he was with her throughout the evening on which the crime was committed (363-65). His co-defendant took the stand and testified that he had only entered Vega's store to buy a soda and that an altercation had occurred during which Vega had fired a gun (401-03). On cross-examination, he admitted knowing Rivera, but denied that he was with him on the evening in question (415). He further denied telling the police, following his arrest, that he had been nowhere near Vega's store and that he had been attacked by 3 men on a street in the Bronx (418-19; 424-25).

In his summation, the prosecutor stated that Vega and Vargas had picked out Rivera's photographs from several shown to them (520, 525). Similarly, in its charge, the Court stated (599):

> "* * * [Y]ou will remember; you will rely, of course, upon your recollection as to the testimony of the witnesses Vargas, Maxwell, and Vega, that they looked at photographs, a number of photographs of different men and that they identified the defendant, Rivera, from one of these photographs".

These references by the District Attorney and Court were condemned as being improper by the Appellate Division, which, nevertheless upheld Rivera's conviction on the ground that "The evidence of the complaining witnesses as to identification was [so] positive and convincing" as to make the improper remarks harmless, particularly where Rivera's guilt was established beyond a reasonable doubt (the Court's full opinion is attached hereto as Appendix "C").

The Court of Appeals similarly affirmed, but by a 4-3 decision. The majority held that "There is here no such

uncertainty of identification or lack of physical visual opportunity to see and remember, as to render the hospital identification 'grossly and unnecessarily suggestive' (*People* v. *Ballot,* 20 N.Y. 2d 600, 607; *People* v. *Brown,* 20 N.Y. 2d 238)". *People* v. *Rivera,* 22 N.Y. 2d, *supra* at 455. The Court noted that, as in *Brown,* "there was ample opportunity to observe defendant during the commission of the crime, and it is equally manifest here, as it was in *Brown,* that the witness' testimony was not based on or tainted by potentially misleading circumstances in the earlier identification". Furthermore, since all the facts as to identification have "been fully explored", a further hearing was not necessary on this question. Finally, the Court concluded that "viewing the 'totality of the circumstances' and the need for the hospital confrontation", there was no violation of constitutional rights, citing *Stovall* v. *Denno,* 388 U.S. 293, 302 (1967). (The full opinion, including the dissent, is annexed hereto as Exhibit "D").

The District Court agreed with the New York Court of Appeals that no evidentiary hearing as to identification was required, finding that the facts surrounding both the robbery and the hospital confrontation had been fully explored at the trial (the Court's specific findings in this respect are contained in its opinion, annexed hereto as Exhibit "A").

The Court also rejected Rivera's claims on the merits, pointing out that Vega and Vargas had ample opportunity to view him at the time of the robbery; that their descriptions of him "tallied"; that they made "immediate and unhesitating positive" identifications of Rivera at the hospital without verbal suggestions from the police; that the "relatively short lapse of time between the robbery and the identifications would indicate that the witnesses' recollections were relatively fresh"; that "each witness separately and independently" identified Rivera, without having discussed the matter between themselves; that at no

time was a third person wrongly identified; that their descriptions matched Rivera's appearance, and that there was nothing *per se* objectionable in employing a show-up.

The District Court, therefore, denied Rivera's application for a certificate of probable cause. However, by order dated February 19, 1971, the Second Circuit granted the certificate, with leave to appeal *in forma pauperis*, and for assignment of counsel.

In its decision reversing the District Court, the Court of Appeals (by LOMBARD, KAUFMAN and TIMBERS, J.J.) held that the pre-trial identification procedures used by the police (the exhibition of photographs to the witnesses and the "show-up" at the hospital) were impermissibly suggestive and conducive to mistaken identification. However, since the Court could not say, as a matter of law, that the witnesses would not have been able to identify respondent at trial without the aid of the impermissible procedures, it remanded the case to the District Court for an evidentiary hearing as to whether the witness' in-court identification was based on the police's unnecessarily suggestive prior procedures or whether the trial identification was independent of these procedures.

Reasons for Granting the Writ

1. The decision of the Second Circuit in this case conflicts with decisions of other Circuits which hold that where witnesses had an initial opportunity to view the perpetrators of the crime at close range in a fully-lit room the identifications are not tainted by subsequent pre-trial confrontations so that their testimony violates due process of law.

The Second Circuit's decision held that the totality of circumstances surrounding the out-of-court confrontations in this case—the photographs and then the one-man show-up twelve days after the crime—lead it to conclude

that the pre-trial identification procedures used here were unnecessarily suggestive and conducive to mistaken identification. However, this conclusion is squarely in conflict with the decisions of other Circuits which hold to the contrary in situations closely analogous to the instant case where there was ample opportunity and motive for the victims of robberies to observe the perpetrator thereof while he was committing the crime in question.

Thus, at bar the robbery took place in a tiny, well-lit neighborhood grocery store during the course of which respondent, who wore no mask, was in close, unobstructed proximity, no more than three to five feet away, to both of the witnesses in question. In fact, he was near enough to one of the witnesses to be able to go through his pockets. Respondent was in the store for up to three minutes. Moreover, the arresting detective testified that he obtained a description of respondent on the night of the robbery after talking to the victims. Finally, both witnesses showed no hesitation about identifying respondent at the hospital confrontation.

Under similar circumstances, other Circuits have refused to find constitutional infirmities present because of subsequent photographic and/or show-up identifications. In the District of Columbia Circuit, see *United States* v. *Hamilton,* 420 F. 2d 1292 (1969) ("accurate identification of the robber" possible because of conditions existent when robbery perpetrated—the lighting, proximity, and length of crime); *Jackson* v. *United States,* 412 F. 2d 149 (1969) ("excellent opportunity to observe robber under good lighting conditions"); *Gregory* v. *United States,* 410 F. 2d 1016 (1969), *cert. denied* 396 U.S. 865 (1969); *United States* v. *Williams,* 421 F. 2d 116 (1970) ("excellent opportunity to observe robbers"). In the First Circuit see, for example, *United States* v. *DeLeo,* 422 F. 2d 487 (1970) (close-range observation of robbery in a well-lit area for up to five minutes), *cert. denied* 397 U.S. 1037 (1970) and

Trask v. *Robbins,* 421 F. 2d 773 (1970) (hospital show-up allowed where witness severely injured by robber); in the Third Circuit, see *United States* v. *Shannon,* 424 F. 2d 476 (1970) (sufficient opportunity to observe robber at close range of three feet) and *United States* v. *Conway,* 515 F. 2d 158 (1969), *cert. denied* 397 U.S. 994 (1969); in the Fourth Circuit, see *United States* v. *Marson,* 408 F. 2d 644 (1968) (witness had good, unobstructed opportunity to observe the robber at close range), *cert. denied* 393 U.S. 1056 (1969), *reh. denied* 393 U.S. 1124 (1969); in the Fifth Circuit, see *United States* v. *Phillips,* 416 F. 2d 954 (1969), *cert. denied* 397 U.S. 953 (1969); *United States* v. *Ballard,* 423 F. 2d 127 (1970) (ample initial opportunity to observe robbers) and *Barber* v. *United States,* 412 F. 2d 775 (1969); and in the Ninth Circuit, see *United States* v. *Stinson,* 422 F. 2d 356 (1969), *cert. denied* 398 U.S. 912 (1970); *Borchert* v. *United States,* 405 F. 2d 735 (1968), *cert. denied* 394 U.S. 972 (1969) and *Davis* v. *United States,* 425 F. 2d 673 (1970) ("excellent chance to closely observe perpetrator").

2. The decision in the instant case conflicts with prior decisions of this Court with respect to what constitutes tainted identification testimony where such identification was not conducted in a prejudicial or suggestive manner.

Since the pre-trial identifications herein (via photographs and the hospital show-up) occurred prior to this Court's decisions in *United States* v. *Wade,* 388 U.S. 218 (1967) and *Gilbert* v. *California,* 388 U.S. 263 (1967), their legality is tested by the standards laid down in *Stovall* v. *Denno,* 338 U.S. 293, 299, 301-02 (1967) as to whether the confrontations were so "unnecessarily suggestive and conducive to mistaken identification" as to deny respondent's right to due process. See also *Simmons* v. *United States,* 390 U.S. 377, 384 (1968).

Although this Court has not set forth specific standards as to what police procedures at pre-trial confrontations

constitute a denial of due process, a comparison of the facts in the instant case with those in the Court's holdings in this area indicates that the procedures utilized at bar were valid.

Thus, one of the witnesses herein testified that four or five days after the robbery, the investigating detective came into the grocery store and showed him four or five photographs of different men. He, in turn, picked out one of the photographs and showed it to the officer. Similarly, the other holdup victim was shown several photographs by the detective in the hospital. Moreover, the officer testified that during the course of his investigation, he showed photographs of five or six different people to the two witnesses. Certainly, as long as the perpetrator of the robbery was at large, there was nothing impermissible in the officer's exhibiting the photographs during the course of his investigation. As *Simmons* v. *United States, supra,* expressly recognized, such a showing was necessary to enable the police to determine if they were on the right track and to aid in their search for the robbers.

As for the hospital show-up, this occurred but twelve days after the robbery and both of the witnesses testified, on cross-examination, that they positively identified Rivera as soon as they saw him without any prior prompting by the police. Moreover, there is absolutely nothing in the record which would even remotely lend itself to a suggestion that the two witnesses had conferred with each other about their identifications prior to the show-up. Incidentally, one of the witnesses was severely wounded by the robbers; the fact that he was able to leave the hospital some two weeks after the show-up was a miracle of medicine that could not be anticipated by the police. This is closely analogous to the situation in *Stovall* v. *Denno, supra,* where, after identifying the defendant at a hospital show-up, the witness in question recovered sufficiently to

be able to testify against him at the trial. In *Stovall*, this Court refused to declare such hospital show-ups as being *per se* violations of due process.

Moreover, in *Biggers* v. *Tennessee*, 390 U.S. 404 (1968), this Court affirmed, by an equally-divided court, a conviction based on an identification which took place some *seven* months after the crime took place (at bar, both identifications were within two weeks). There was no in-court identification but only the witness' testimony about her voice identification at the stationhouse. In addition, the witness' opportunity to observe her attacker was limited, unlike the situation in the instant case.

In *Coleman* v. *Alabama*, 399 U.S. 1, 3-6 (1970), this Court refused to find a lineup identification to be violative of due process where it took place some two months after the commission of the crime and the witness had only a few seconds to observe the defendant in the glare of the headlights of an oncoming automobile, the assault in question having occurred late at night on the side of a highway.

In *Foster* v. *California*, 394 U.S. 440 (1969), the only pre-*Wade* confrontation found by this Court to be unconstitutional, the witness was unable to make a positive identification of defendant until after a three-man lineup, a one-to-one confrontation in which defendant talked to the witness, and a second lineup in which defendant was the only person who had participated in the original lineup. There was no such hesitation at bar.

Based on this Court's decisions in *Biggers* v. *Tennessee*, *Coleman* v. *Alabama* and *Foster* v. *California*, it would appear that a finding of a denial of due process of law in a pre-*Wade* identification requires a highly prejudicial situation not present in the instant case. The witnesses' identification of Rivera were immediate and positive, nor was respondent required to speak to them as in *Foster*, *supra*. The effect of the decision below is to expand the

standards of what constitutes a denial of due process in a pre-*Wade* identification beyond the determinations of this Court, especially in a situation where the initial opportunities for observation were so adequate. Contrast with this the Court's warning in *Simmons* v. *United States,* 390 U.S. 377, *supra,* at 383, that "A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions".

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York, October 5, 1971.

Respectfully submitted,

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Appendix "A"

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Pro Se 69-C-4608

January 13, 1970

UNITED STATES ex rel. MILTON RIVERA,

Petitioner,

v.

CHARLES MCKENDRICK,

Respondent.

MCLEAN, J.

MEMORANDUM AND ORDER

Relator was convicted after a jury trial in the state court of the crimes of robbery in the first degree, assault in the first degree, assault in the second degree, and possession of a dangerous weapon as a felony. At the trial, he was identified as the perpetrator of the crimes by two witnesses. Both these witnesses soon after the crime had been shown a group of photographs containing one of relator, and both, some twelve days after the crime, had separately identified relator at a "show-up" at the hospital where one of the witnesses was recovering from a gunshot wound. Relator's counsel was not present at any time. During the trial and on appeal in the state court, the critical issue was whether the identification procedures violated relator's constitutional rights. On this application for a writ of habeas corpus, he presses the same claim.

There was no evidentiary hearing on the question of identification in the state court. The facts surrounding the identifications were brought out primarily on cross-

examination. In affirming relator's conviction, the Court of Appeals of New York held that the facts of the hospital identification had been fully explored at trial and that there was no need for a further hearing on this issue.

People v. *Rivera,* 22 N.Y.2d 453, 239 N.E.2d 873 (1968), *cert. denied,* 395 U.S. 964 (1969).

I take the same view. While it was not brought out at the trial whether relator was identified when his photograph was shown to the two witnesses, nonetheless it does fairly appear from the record that the police officers never prompted either witness with respect to his identification, that both independently and immediately identified relator at the hospital "show-up" and that both never wavered in their conclusions thereafter. The facts surrounding the hospital confrontation were fully explored, as were the circumstances of the robbery in which the witnesses first viewed relator. Whether any more could be elucidated now, some five years later, is highly dubious. I am satisfied that the material facts were adequately developed in the state court proceeding and that no hearing is required here.

See Townsend v. *Sain,* 372 U.S. 293 (1963).

Turning to the merits, I conclude that relator's claim must fail. Since the confrontations challenged in this case occurred in March 1965, antedating the Supreme's Court's decisions in *United States* v. *Wade,* 388 U.S. 218 (1967), and *Gilbert* v. *California,* 388 U.S. 263 (1967), the governing principle is that laid down in *Stovall* v. *Denno,* 388 U.S. 293 (1967) and *Simmons* v. *United States,* 390 U.S. 377 (1968). As the Court of Appeals has stated:

> "[T]he required inquiry is two-pronged. The first question is whether the initial identification proce-

> dure was 'unnecessarily' [*Stovall*] or 'impermissibly' [*Simmons*] suggestive. If it is found to have been so, the court must then proceed to the question whether the procedure found to have been 'unnecessarily' or 'impermissibly' suggestive was so 'conducive to irreparable mistaken identification' [*Stovall*] or had such a tendency 'to give rise to a very substantial likelihood of irreparable misidentification' [*Simmons*] that allowing the witness to make an in-court identification would be a denial of due process."
>
> *United States ex rel. Phipps* v. *Follette,* Docket No 34517 (2d Cir. May 27, 1970) at 2997-2998; *See also United States ex rel. Rutherford* v. *Deegan,* 406 F.2d 217, 219 (2d Cir. 1969), *cert. denied,* 395 U.S. 983 (1969).

The resolution of this issue "depends on the totality of the circumstances."

Stovall v. *Denno, supra,* 388 U.S. at 302.

In this case, the Court of Appeals of New York determined that the hospital confrontations were not "grossly and unnecessarily suggestive," 22 N.Y.2d at 455, 239 N.E.2d at 874, and that on the "totality of the circumstances," *id.,* it could not be said that there was a violation of relator's constitutional rights.

Applying the federal standard, I reach the same result.

While the witnesses may have been agitated at the time of the robbery, both had ample opportunity to view relator in a fully lighted room. Their descriptions of him tallied. At the hospital, both made immediate and unhesitating positive identifications. No verbal suggestions were made to either witness by police officers. The relatively short lapse of time between the robbery and the identifications

would indicate that the witnesses' recollections were relatively fresh. That each witness separately and independently identified relator, without having discussed the matter between themselves, further strengthens the conclusion that there was no misidentification. At no time did either witness misidentify someone else as the perpetrator of the crimes. Their earlier descriptions of the hold-up man matched relator's actual physical appearance. While a "show-up" situation contains inherent possibilities for suggestion, there is nothing *per se* objectionable in employing such a procedure.

Stovall v. *Denno, supra;*
United States ex rel. Phipps v. *Follette, supra;*
United States ex rel. Anderson v. *Mancusi,* 413 F.2d 1012 (2d Cir. 1969).

After considering all the factors, the application is denied.

So ordered.

Dated: June 10, 1970.

EDWARD C. MCLEAN,
U. S. D. J.

Appendix "B"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 981—September Term, 1970.

(Argued June 17, 1971 Decided August 9, 1971.)

Docket No. 71-1193

UNITED STATES OF AMERICA *ex rel.* MILTON RIVERA,

Petitioner-Appellant,

—v.—

CHARLES L. MCKENDRICK, as Warden of Wallkill State Prison, Ulster County, New York,

Respondent-Appellee.

Before:

LUMBARD, KAUFMAN and TIMBERS,*

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Edward C. McLean, *J.*, denying relator's petition for a writ of habeas corpus, which claimed that the in-court identification of him by two victims of his alleged crime was based on impermissibly suggestive pre-trial identification procedures, in violation of the due process clause.

Reversed and remanded for an evidentiary hearing.

* When the case was argued Judge Timbers was a District Judge sitting by designation.

Appendix "B"

JOHN R. HUPPER, New York, N. Y. (J. Barclay Collins, on the brief), *for petitioner-appellant.*

WILLIAM J. STUTMAN, New York, N. Y. (Samuel A. Hirshowitz, First Assistant Attorney General, on the brief), *for respondent-appellee.*

LUMBARD, *Circuit Judge:*

Milton Rivera, who was convicted in a New York state court in 1965 for robbery and assault, appeals from an order of the Southern District of New York, Edward C. McLean, *J.*, dated June 10, 1970, denying his petition for a writ of habeas corpus. That petition alleged that his conviction, which was based solely on the identification testimony of two victims of the crimes, was obtained in violation of due process of law, because the victims' in-court identification of Rivera was tainted by impermissibly suggestive pre-trial identification procedures used by the police. Since the present record is inadequate for a full consideration of Rivera claim, we reverse the district court's determination and remand the case for an evidentiary hearing on that claim.

The relevant facts are as follows: During the evening of March 5, 1965, two men, one dark-skinned and the other light-skinned, entered a grocery store in Brooklyn. Vega, an employee, and Vargas, a customer, were inside. The dark-skinned man—later identified as Torres, Rivera's co-defendant—held a gun on the two men, while the other took the money out of the cash register. The light-skinned man then grabbed Vega, took his wallet, and shouted to Torres to shoot Vega. Vargas then shouted to Vega not to be afraid, but Torres immediately shot Vargas and in an ensu-

ing struggle Vargas received another shot in the neck. Meanwhile, after the first shot was fired, the light-skinned man dashed from the store; he was not inside for more than three minutes. Torres, too, finally escaped, but he was apprehended several hours later, having left identifying papers in the store. Three days later, the police sent out an alarm for Rivera, although the record does not show the basis for their determination that he was a suspect.

Thereafter, the police showed Vega certain photographs. According to Vega's testimony at trial, Detective Maxwell at one point told him that "he had him [Rivera] and showed me a photograph." Vega also testified that Maxwell "showed me a photograph and I said to him 'Is this the man?' " Apparently on another occasion, Maxwell showed Vega a group of four or five photographs of different men, including one of Rivera, and Vega picked one out. However, because of the New York rule that a witness may not testify as to his prior identification of a defendant by means of photographs,[1] there was no testimony as to whether Vega picked out Rivera's photograph. The record is not clear as to whether Vega was first shown the single photograph or the group of four or five. Similarly, Vargas was shown certain photographs—it is unclear how many—while he was in the hospital recovering from the gunshot wounds, and he was asked whether he would know a person from that group. Pursuant to New York law, there was no testimony as to his response, and none of the photographs shown to either victim was offered in evidence.

On March 17, Rivera's attorney advised the police that Rivera had heard that he was wanted for questioning, and later that day Maxwell arrested Rivera at his attorney's office. Maxwell first took Rivera to the station house, and

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[1] This rule was established by the New York Court of Appeals in *People* v. *Cioffi*, 1 N.Y.2d 70 (1956). See also *People* v. *Giamario*, 20 A.D.2d 815 (2d Dept. 1964).

he then called Vega and instructed him to come to the hospital where he was "going to have someone down for him [Vega] to identify." Maxwell presented Rivera to Vega in the hospital waiting room and asked Vega whether he "knew the guy." Vega said "yes" and Rivera remained silent. Maxwell then took Rivera into Vargas' hospital room, but there was no testimony as to whether Vargas identified him there. Maxwell never took either witness to the police station to identify Rivera in a lineup.

Both Vega and Vargas testified at trial in the Kings County Supreme Court, and both made an in-court identification of Rivera as the light-skinned man involved in the robbery. Rivera's co-defendant, Torres, on the other hand, while admitting knowing Rivera, testified that Rivera was not with him at any time during the evening of March 5; and a woman friend of Rivera testified that Rivera was with her throughout that evening. Rivera did not testify in his own behalf.

The prosecutor, in summation, stated that both Vega and Vargas had selected Rivera's photograph from several shown to them, and the court in its charge also stated that those witnesses had made such selection. As previously noted, there was no such testimony from any witness at trial.

The jury returned a verdict of guilty against both Rivera and Torres on the crimes of robbery in the first degree, assault in the first and second degree, and possession of a dangerous weapon as a felony. Rivera was sentenced to a prison term of ten to fifteen years on the robbery count and to concurrent lesser terms on the other counts. He is presently serving his term.

Rivera's conviction was affirmed by the Appellate Division, Second Department, which held that while the remarks by the prosecutor and the trial court as to the witnesses' prior photographic identification of Rivera were

improper, the errors were harmless. *People* v. *Rivera,* 28 A.D.2d 687 (2d Dept. 1967). The New York Court of Appeals similarly affirmed the conviction, but by a 4-3 decision. *People* v. *Rivera,* 22 N.Y.2d 453 (1968). The three dissenters felt that the pre-trial identification procedures used here were unnecessarily suggestive and that there was a grave risk that the witnesses' in-court identification of Rivera was based upon those prior identifications, and they therefore felt that the case should be remanded for a hearing on that question. 22 N.Y.2d at 456 (Fuld, *C.J.,* dissenting). The Supreme Court denied certiorari. *Rivera* v. *New York,* 395 U.S. 964 (1969).

Rivera filed this petition for habeas corpus on October 21, 1969. The district court denied that petition without holding an evidentiary hearing, finding that the material facts were adequately developed and fully explored in the state court trial and that "[w]hether any more could be elucidated now, some five years later, is highly dubious." The district judge was also satisfied on the merits that the two witnesses' identification of Rivera as the criminal was accurate. By order dated February 19, 1971, we granted Rivera a certificate of probable cause, with leave to appeal *in forma pauperis* and for assignment of counsel.

We agree with Chief Judge Fuld's dissent in the New York Court of Appeals that the pre-trial identification procedures used by the police here were impermissibly suggestive and conducive to mistaken identificatiton. While we cannot say, as a matter of law, that Vega and Vargas would not have been able to identify Rivera at trial without the aid of those previous and impermissible procedures, we believe that it is highly probable that the in-court identification was so tainted. Hence, we must remand the case to the district court for an evidentiary hearing as to whether the witnesses' in-court identification was based on the police's unnecessarily suggestive prior procedures, in

which case the use of such testimony would be a denial of due process, or whether the trial identification was independent of those procedures.

Since the confrontations in question here occurred two years before the Supreme Court's decision in *United States* v. *Wade*, 388 U.S. 218 (1967), the governing principles are those of *Stovall* v. *Denno*, 388 U.S. 293, 302 (1967), and *Simmons* v. *United States*, 390 U.S. 377, 384 (1968). We have previously set forth those principles as follows:

> "[T]he required inquiry is two-pronged. The first question is whether the initial identification procedure was 'unnecessarily' [Stovall] or 'impermissibly' [Simmons] suggestive. If it is found to have been so, the court must then proceed to the question whether the procedure found to have been 'unnecessarily' or impermissibly' suggestive was so 'conducive to irreparable mistaken identification' [Stovall] or had such a tendency 'to give rise to a very substantial likelihood of irreparable mis-identification' [Simmons] that allowing the witness to make an in-court identification would be a denial of due process."

United States ex rel. Phipps v. *Follette*, 428 F.2d 912, 914-15 (2 Cir. 1970).

Looking to the first part of this two-pronged inquiry, we believe that the pre-trial identification procedures used here were impermissibly suggestive. The police's use of photographs began that suggestiveness. On one occasion, for instance, Vega was shown a single photograph, presumably of Rivera, and he inquired of Maxwell, "Is this the man?" The use of a single photograph is by itself a highly suggestive technique, and Vega's question was hardly that of an eyewitness sure of his identification. The record is not clear as to whether that showing preceded or succeeded the showing of a group of photographs to Vega,

nor is it clear as to what was said about the photograph. As to the showing of the group of photographs to both Vega and Vargas, the record does not indicate whether those photographs were all of men who resembled Rivera or whether the photograph of Rivera was in some way emphasized, such as being the only one of a man with the same skin coloring and facial characteristics as the light-skinned man involved in the crime, whom the witnesses had previously described. Moreover, the record does not show what conversations transpired between Vega and Vargas and the police with respect to these photographs, nor, of course, whether the witnesses identified Rivera from them. These are surely questions to be explored at the evidentiary hearing in determining the extent of the damage done to the in-court identification by these photographic sessions.[2]

The one-man show-up at the hospital added to the suggestiveness. The Supreme Court stated in *Stovall* that "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." 388 U.S. at 302. While we have held that such a one-man show-up is not *per se* impermissible [e.g., *United States ex rel. Anderson* v. *Mancusi*, 413 F.2d 1012 (2 Cir. 1969); *United States ex rel. Phipps* v. *Follette, supra*], the circumstances surrounding the show-up here demonstrate an unwarranted influence by the police. Maxwell's statement to Vega that he was "going to have somebody down for [Vega] to identify," and Maxwell's testimony that he had a "talk" with Vargas

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[2] While evidence as to whether the witnesses identified Rivera by means of a photograph prior to trial was correctly excluded at trial, under the rule of *People* v. *Cioffi*, 1 N.Y.2d 70 (1956) (see note 1, *supra*), that rule has no application in an evidentiary hearing at this stage to determine whether trial identification was tainted by prior suggestive action by the police. Indeed, such evidence may be very relevant to Rivera's constitutional claim of a tainted identification at trial.

in his hospital room before Rivera was brought in reinforce that conclusion. Moreover, in the cases cited above, where we have upheld the one-man show-up, the out-of-court identifications were made immediately after the crime occurred and there was no possibly suggestive use of photographs prior to the show-up identification. Here, of course, the hospital confrontations did not take place until twelve days after the crime and prior use of photographs was made. Yet Vega and Vargas were presented with no persons other than Rivera for possible identification in order to test their specific recollection.

The Supreme Court did recognize in *Stovall* that one-man show-ups may be necessary when the exigencies of the situation do not permit any other course. Here, however, there was no compelling reason for such man-to-man confrontation. Vega, of course, was uninjured and could easily have been brought to the police station for lineup confrontation. Vargas was recovering and soon to be released, and hence his confrontation of Rivera could have been postponed until he could view a lineup in the station, or at least a lineup could have been held in his hospital room. While we are not holding that an unnecessary lineup, without more, is unnecessarily suggestive, the police's actions under all the circumstances here were impermissibly conducive to false identification and demand that the entire pre-trial identification procedures be carefully scrutinized to determine whether they infected the in-court identifications.

The record is silent as to what Maxwell said to Vargas before Rivera was brought in and as to whether Vargas then identified Rivera as the criminal. It is equally silent as to what Vega meant by his affirmative reply at the hospital to Maxwell's question: "Do you know the guy?" These are questions which might well be answered in an evidentiary hearing.

In sum, the totality of circumstances surrounding the out-of-court confrontations in this case—the photographs and then the one-man show-up twelve days after the crime—lead us to conclude that the pre-trial identification procedures used here were unnecessarily suggestive and conducive to mistaken identification. The next step, then, is to determine whether the witnesses' in-court identification was irreparably tainted by those procedures so as to deny the defendant due process of law.

The Supreme Court warned in *United States* v. *Wade, supra,* that "[i]t is a matter of common experience that, once a witness has picked out the accused [in pre-trial identification procedures], he is not likely to go back on his word later on, so that in practice the issue of identity may (in the absence of other relevant evidence) for all practical purposes be determined there and then, before the trial." 388 U.S. at 229. Likewise, the Court stated in *Simmons* v. *United States, supra,* that "[r]egardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." 390 U.S. at 383-84.

The Supreme Court's statements are particularly apt in the circumstances of the instant case. Both Vega and Vargas admitted that Torres' accomplice was a complete stranger to them and that he was in the store less than three minutes. They probably had even less time to observe him, because, for at least a portion of the time, the light-skinned man was busy emptying the cash register and Vega's pocket while Torres stood in front of them with a gun, and because during another portion of the time the witnesses' attention was distracted from the accomplice by the shot at Vargas. The fact that the witnesses saw the criminal for so short a period at the time of the robbery increases their susceptibility to suggestion and thus increases the danger that their in-court identification was based on their pre-trial confrontations.

Appendix "B"

The impact on the witnesses' memories of the photographic sessions and of the one-man show-up at the hospital was undoubtedly considerable, especially with the police present, and may well have overpowered whatever recollection they previously might have had of Torres' accomplice on the night of the crime. In light of the well-known hazards of identification testimony in any case [see *United States* v. *Fitzpatrick,* 437 F.2d 19, 23-25 (2 Cir. 1970); G. Williams, The Proof of Guilt 106-124 (1963)], the influence of the improper suggestive procedures here is particularly dangerous. In short, there is a very substantial risk that the in-court identification of Rivera by Vega and Vargas was based, not on their recollection of Torres' accomplice himself, but on the hospital identification which in turn was made more suggestive by the prior use of the photographs. If so, that in-court identification was a denial of Rivera's right to due process of law.

Any error that may have been committed was harmful, since the identification of Rivera by Vega and Vargas was the only evidence offered by the prosecution to convict him; and if that evidence was tainted by prior impermissible procedures, the conviction cannot stand. The potential for prejudicial error is increased by the fact that both the prosecutor and the trial judge stated to the jury that Vega and Vargas had testified that they had selected Rivera's photograph out of a group of photographs of several different men. Not only was it error to make such statements to the jury, but in fact there was no testimony to that effect.*

For these reasons, we reverse the district court's summary denial of Rivera's petition for habeas corpus; and since, as shown above, we find the present record to be wholly inadequate for us to determine whether the witnesses' in-court identification of Rivera was based on the

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* See note 1, *supra,* and accompanying text.

impermissibly suggestive identification procedures prior to trial, we remand this case to the district court for an evidenitary hearing on that question. The record of the state court proceedings tells us very little about the circumstances surrounding the photographic sessions and the hospital confrontations and almost as little about the witnesses' observation of Torres' accomplice during the robbery itself. Since both sets of factors are highly relevant to the question whether the in-court identification was impermissibly tainted, an evidentiary hearing is essential.

We commend assigned counsel, John R. Hupper, Esq., and J. Barclay Collins, Esq., for their thorough and effective presentation of Rivera's claims.

TIMBERS, *Circuit Judge* (concurring):

I concur in the Court's judgment of reversal and in Judge Lumbard's lucid opinion in all respects. My only reservation is directed at the practicality of remanding to the District Court for an evidentiary hearing more than six years after the critical events. I agree with Judge McLean's observation more than a year ago that "[W]hether any more could be elucidated now, some five years later, is highly dubious."

Accordingly, I would reverse and remand to the District Court with directions that the writ issue unless the State grants petitioner a new trial within sixty days. That would place the responsibility where it seems to me it rightly belongs, i.e. upon the State authorities, to determine whether petitioner should be released or retried. Chief Judge Fuld, in his dissenting opinion, 22 N.Y.2d at 456, thought that the case should have been remanded to the State trial court for a hearing on the propriety of the pre-trial identification procedures and their bearing upon the in-court identification. I would let the State trial court make that determination, guided by Judge Lumbard's eminently sound opinion.

Appendix "C"

Opinion of the Appellate Division, Second Dept.

Judgment of the Supreme Court, Kings County, rendered November 30, 1965, affirmed.

While it is error to permit a witness to testify as to his prior identification of a defendant by means of photographs (People v. Cioffi, 1 NY 2d 70, 150 NYS 2d 192, 133 N.E. 2d 703; People v. Giamario, 20 AD 2d 815, 248 NYS 2d 726, affd. 15 NY 2d 939, 259 NYS 2d 156, 207 N.E. 2d 200) and the references by the District Attorney and the court to such testimony were improper (see, e.g., People v. Hunnicutt, 15 AD 2d 536, 222 NYS 2d 713; People v. Mezzapella, 19 AD 2d 729, 242 NYS 2d 536), that does not, in our judgment, necessitate a new trial. The evidence of the complaining witnesses as to identification was positive and convincing. They had defendant under observation for three minutes, in a store illuminated with six fluorescent lights and while they were in close proximity to him. Under such circumstances, we believe the errors should be disregarded (cf. People v. Rogers, 21 AD 2d 720, 250 NYS 2d 131; People v. Friedberg, 24 AD 2d 1008, 266 NYS 2d 53; People v. Milburn, 26 AD 2d 420, 274 NYS 2d 973), particularly where, as here, the defendant's guilt was established beyond a reasonable doubt (Code Crim. Proc., Sec. 542; People v. Vanderborg, 301 NY 750, 95 N.E. 2d 626). Defendant's other contentions have been examined and we find no merit therein.

Appendix "D"

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. MILTON RIVERA, Appellant.

Argued June 4, 1968; decided July 2, 1968.

Crimes—robbery—assault—defendant, convicted of robbery and assault, was identified by store clerk and customers who had him under observation in well-lighted store for three minutes—no error in having victims identify defendant at hospital where victim was under treatment—no violation of defendant's constitutional rights.

At the trial of defendant for the hold-up of a grocery store, the store clerk and a customer, who had defendant under observation from a distance of one to five feet in a well-lighted store for at least three minutes, identified him. One of the witnesses, who had been seriously wounded in the hold-up, identified defendant at a hospital where he was under treatment. The other witness separately identified defendant at the hospital. It was reasonable for the police to take defendant to the hospital immediately after arrest to see if the victims identified him. This was neither time nor place for a line-up. There is here no such uncertainty of identification or lack of physical visual opportunity to see and to remember, as to render the hospital identification grossly and unnecessarily suggestive. No violation of defendant's constitutional rights has been demonstrated.

People v. *Rivera*, 28 A D 2d 687, affirmed.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered June 5, 1967, affirming a judgment of the Supreme Court (MICHAEL J. KERN, J.), rendered in Kings

County upon a verdict convicting defendant of robbery in the first degree, assault in the first degree, assault in the second degree and possession of a dangerous weapon as a felony.

Ira P. Sloane for appellant. I. Testimony of prior identification, persistently referred to by the court and prosecution, irrevocable prejudiced appellant. (*United States* v. *Wade,* 388 U. S. 218; *Stovall* v. *Denno,* 388 U. S. 293; *Gilbert* v *California,* 388 U. S. 263; *People* v. *Jung Hing,* 212 N. Y. 393; *People* v. *DeMartini,* 213 N. Y. 203; *People* v. *Katz,* 209 N. Y. 311; *People* v. *Trowbridge,* 305 N. Y. 471; *People* v. *Cioffi,* 1 N Y 2d 70; *People* v. *Ordner,* 17 N Y 2d 898; *People* v. *Jenkins,* 24 A D 2d 716.)

Aaron E. Koota, District Attorney (*Harold M. Brown* of counsel), for respondent. The primary issue was credibility of the witnesses. The claim of "prejudicial identification testimony" is a posttrial afterthought which presents no question of law for review by this court. (*People* v. *Trowbridge,* 305 N. Y. 471; *People* v. *Deitsch,* 237 N. Y. 300; *United States* v. *Wade,* 388 U S 218; *Gibelt* v *Carlifornia,* 388 U. S. 263; *Stovall* v. *Denno,* 388 U. S. 293; *People* v. *Milburn,* 19 N Y 2d 910.)

Bergan, J. At the trial of defendant for the hold-up of a grocery store, two witnesses, the store clerk and a customer, unqualifiedly identified him. The witnesses had defendant under observation from a distance of one to five feet in a well-lighted store ("two big fluorescent lights") for at least three minutes.

No objection was made by the defendant to the testimony of identification by the witnesses. On cross-examination defendant adduced proof that one of the witnesses, Vargas, the customer who had been shot in the hold-up, identified defendant at a hospital where he was under treatment.

The other witness, Vega, the clerk, came to the hospital at the same time and there separately identified defendant. No motion was made by defendant after this proof was adduced, to strike out any of the testimony of identification.

Vargas had been seriously wounded in the hold-up. The police did not know whether he would or would not recover. It was entirely reasonable for them to bring defendant to the hospital immediately after arrest to see if the victims identified him. This was neither time nor place for a line-up.

There is here no such uncertainty of identification or lack of physical visual opportunity to see and to remember, as to render the hospital identification "grossly and unnecessarily suggestive (*People* v. *Ballott*, 20 N Y 2d 600, 607; *People* v. *Brown*, 20 N Y 2d 238).

Here, as in *Brown*, there was ample opportunity to observe defendant during the commission of the crime, and it is equally manifest here, at it was in *Brown*, that the witnesses' testimony was not based on or tainted by potentially misleading circumstances in the earlier identification.

Nor is it clear that any useful purpose would now be served on a new hearing addressed to the question of the possible effect of the hospital identification on the certainty of the trial testimony where all the facts—the certain trial identification and the nature of the hospital identification—have alike been fully explored. The need for and the useful role of a hearing necessarily depend on the facts of each case. (Cf. *United States* v. *Wade*, 388 U. S. 218.)

It may be held here, as it was in *Stovall* v. *Denno* (388 U. S. 293), that viewing the "totality of the circumstance" and the need for the hospital confrontation (p. 302) no violation of defendant's constitutional rights has been demonstrated.

The judgment should be affirmed.

Appendix "D"

Chief Judge FULD (dissenting). The dramatic presentation of a lone suspect to the two witnesses in a hospital is precisely the sort of "grossly and unnecessarily suggestive" identification technique which this court has condemned. (See, e.g., *People* v. *Ballott*, 20 N Y 2d 600, 607; *People* v. *Brown*, 20 N Y 2d 238, 243-244; see, also, *Stovall* v. *Denno*, 388 U. S. 293, 301-302.) Although we may not say, as a matter of law, that the witnesses would not have been able to identify the defendant at the trial without the aid of this previous identification, we may not, on the other hand, conclude—as we did in the *Brown* case (20 N Y 2d 238, *supra*)—that the three minutes, during which the robbers were in the witnesses' presence at the time the crime was committed, afforded them so "ample [an] opportunity to observe the defendant" that "it is manifest that [their] courtroom testimony identifying him was not based on, or tainted by, the potentially misleading circumstances of [their] earlier identification" (p. 244).

The case, therefore, should be remanded for a hearing to determine whether or not the in-court identification was, in fact, based upon observations of the suspect other than the hospital identification.

Judges SCILEPPI, BREITEL and JASEN concur with Judge BERGAN; Chief Judge FULD dissents and votes to reverse in an opinion in which Judges BURKE and KEATING concur.

Judgment affirmed.